No. 12,452

IN THE

United States Court of Appeals

For the Ninth Circuit

SAM GAILBREATH,

Appellant,

vs.

THE HOMESTEAD FIRE INSURANCE COMPANY and SUN INSURANCE OFFICE, LIMITED,

Appellees.

Appeal from the United States District Court, Northern District of California, Northern Division.

Honorable Dal M. Lemmon, Judge.

APPELLANT'S REPLY BRIEF.

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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PREFACE.

At the outset, counsel in the proper discharge of their relationship to appellant, are first impelled to direct the attention of this Honorable Court to certain, fatal factual weaknesses which do exist in the appellees' cause and to a total lack of even a scintilla of law or fact sufficient to sustain the Judgment of the Honorable United States District Court or to warrant the application of,

(1) The doctrine of "*res ipsa loquitur,*" or a scintilla of proof that,

(2) The fire inside the stove was communicated outside the stove and that the fire in the stove was the direct and proximate cause of the spontaneous ignition of the floor and walls of the building or a scintilla of proof that,

(3) Defendant Gailbreath was guilty of one act of negligence which was the proximate cause of the fire.

At the threshold of Appellant's reply brief, Appellant does feel impelled to direct the Court's attention to the necessity of a clear, concise and accurate epitomization of the facts as established by the evidence. This is universally recognized by the Courts as the first fundamental prerequisite to the writing of a good brief by either party to the controversy for the reason that, where the facts are once clearly understood, the law generally is comparatively easy, and a case well stated is more than half argued.

A FACTUAL CLARIFICATION.

A. The chimney and flue were not installed or controlled by Appellant but were installed and under the control of Appellees.

The evidence does conclusively establish without the slightest suggestion of contradiction or innuendo of impeachment that the Herold Lumber Company,

and not Appellant Galbreath did furnish and install the flue, chimney or stovepipe.

Witness Charles W. Little, employed by Appellees, insured (the Herold Lumber Company) to operate the lumber business, did testify as follows:

Q. Well, there was no stovepipe listed on the invoice, is there?

A. I noticed that.

Q. Do you think you used some stovepipe of your own there?

A. Well, that I can't answer.

Q. You don't know.

A. If there was some——

Q. Do you know who installed the stovepipe?

A. The stovepipe?

Q. Yes.

A. Or the flue?

Q. The stovepipe or the flue?

A. Or the flue?

Q. The stovepipe.

A. The stovepipe from the stove to the flue?

Q. Yes.

A. I do not. (T. 62.)

The sales invoices do establish that Appellant Gailbreath did not sell or deliver any stovepipe or chimney to the Herold Lumber Company. See Plaintiff's Exhibit 1. T. Page 40 and Plaintiff's Exhibit 3. T. Page 47.

Appellees' witness Roy Albers, an employee of the Appellees' insured, testified he took delivery of the stove from Appellant Gailbreath at the request of

his superior Charles W. Little and did further testify as follows:

Q. Now, did you get any stovepipe with the stove?

A. No, sir. (T. Page 31.)

The Appellant Gailbreath testified as follows:

Q. Did you deliver any stovepipe for this stove?

A. No.

Q. Was any ordered from you?

A. No. (T. Page 15.)

The witness Cerino Lemos, an employee of the Appellant Gailbreath, did testify as follows:

Q. Did you see any workmen there?

A. Yes, there was one in particular. He was putting up this chimney. I asked him if he was having difficulties in putting the chimney pipe or the stovepipe through the wall. He was to head up this chimney stack something. I didn't pay much attention because my instructions was to put the drum down there and fill it up, not to install it.

Q. In other words, these workmen were installing the pipe, the stovepipe which led from the stove to the flues?

A. Yes, sir.

Mr. Castro. He said one workman. I didn't understand him to say more than one.

Mr. Desmond. Q. How many workmen were there, Mr. Lemos?

A. Well, if you want to be identical about it, I would say there were about two painters. This boy particularly was working on the stovepipe.

That makes a total of three. And probably one of the light men, and that makes about five, guys in the middle office, so it would make a total of seven men now. I don't know for sure and who was doing what. (T. Page 109.)

Witness Charles W. Little testified the Herold Lumber Company had four employees working on the the premises the day of the fire.

Q. How many employees did you have at the Herold Lumber Company on the day of the fire?
A. Four. (T. Page 162.)

Lars Wold, an employee of Appellees' insured Herold Lumber Company, installed the FLUE which testimony stands unimpeached.

Q. I see, all right. Now, Mr. Wold, did you install the flue?
A. Yes, sir. (T. Page 122.)

B. The Standard Oil Floor Hardener had been freshly applied, was still wet and was highly combustible.

CHARLES W. LITTLE, Business Manager of the Herold Lumber Company, testified as follows:

By Mr. Desmond:

Q. Are you familiar with the type of material that is known as Standard Oil Floor Hardener?
A. Well, no, not too familiar with it.
Q. Do you know whether or not it is inflammable?
Mr. Castro. OBJECTS——
The Court. OBJECTION OVERRULED.
A. I would say it was. (T. Page 63.)

The witness Charles W. Little did further testify:

Q. Now, what time was the office painted?

A. Well, it was painted the day before. I am not sure but what some of it had been done the day before that.

Q. Was any of it painted on the morning of the fire?

A. There was a little patch of floor in back of the door in front of the counter that hadn't been painted. (T. Page 56.)

LARS WOLD, an employee of Appellees' insured Herold Lumber Company, did testify as follows:

Q. Now, do you—what do you know anything about this material Standard Oil Floor Hardener?

A. IT'S INFLAMMABLE. (T. Page 122.)

On the day of the fire Lars Wold testified as to the following circumstances.

Q. Do you know what they were doing?

A. Sir? They were painting, but I am not sure.

Q. Do you know what sort of paint they were using?

A. Standard Oil Hardener.

Q. Where were they applying it?

A. I am not sure. I think it was the walls. He had the floor all painted in.

Q. What do you recall about the floor?

A. He had boards. We had to walk on boards there so we wouldn't take the stuff up. (T. Pages 121-122.)

C. There is no testimony as to the flash point of Standard Oil Floor Hardener.

The Appellees have resorted to the extremity of announcing to this Court that the testimony does establish 105 degrees Fahrenheit as the Flash Point, *mind you, FLASH POINT,* of Standard Oil Floor Hardener. To accomplish this purpose they have sought to utilize the insidious approach of Appellees' offer to stipulate, which offer stands unaccepted by Appellant.

> Mr. Castro. We will stipulate to it, Counsel, we have no objection to it, Your Honor. It was painted with STANDARD OIL FLOOR HARDENER which was provided by Sherwin-Williams Company and sold as a Standard Oil Product. The point of inflammation is 105 Fahrenheit. The flash point is 105 degrees. (T. Page 76.)

D. Gailbreath and his employees did not know Standard Oil Floor Hardener had been applied or that it was highly explosive.

In their abortive effort to seek application of the "*res ipsa loquitur* doctrine," Appellees have again reached out to the utmost limits of legal inference when they charge on page (6) of their Brief viz.: "*Appellant had full knowledge concerning painting which was done on the day of the fire in the office.*"

Suffice it to say that Gailbreath's employees saw a liquid being applied to the floor and walls of the office on the day of the installation by employees of the insured, Herold Lumber Company. Albeit that the evidence establishes the foregoing fact, then in the

absence of even an iota of additional evidence, by what processes of legal legerdemain can it be inferred that Gailbreath or his employees had analytical knowledge of the contents of the liquid being applied to the walls and floor by the Herold Lumber Company? If they assumed it to be an oil base paint, then it is common knowledge that the direct flame of a gas torch will not ignite such a substance when contained in a pot or spread on walls.

E. This was the instance of an explosive flash fire which occurred unconnected from the fire within the stove and was not the slow process of heat igniting a wooden structure.

After reading the supra testimony, it would be logical to conclude that the highly inflammable Standard Oil Floor Hardener had on the day of the fire been applied to the walls adjacent to the stove and to the floor immediately adjacent to the stove and that this highly combustible liquid was wet at the time of the fire. Then, *if the fire was an explosive, flash fire, it must follow as a corollary that the inflammability and explosive qualities of the Standard Oil Floor Hardener were the proximate cause of the fire and not the stove or its contents.*

JACK E. LITTLE, an employee of the Appellees' insured Herold Lumber Company, testified as follows:

Q. And then what happened?

A. *Well, almost immediately after it, I hung up the 'phone which I did as soon as I saw the fire. The fire started up the inside of the wall. It traveled up the wall like a raising curtain. It*

almost immediately SPREAD THE FULL WIDTH OF THE ROOM, WENT UP the wall and across the ceiling and started down the other sides.

Q. *And then did you leave it?*

A. *I went out on my hands and knees.* (T. Page 68.)

If the explosive and highly inflammable Standard Oil Floor Hardener had not been applied on the day of the fire, could it be reasonably presumed that a fire burning in a steel enclosed Customaire stove, and which fire, by the entire evidence, was never directly communicated from the interior of the stove to the exterior of the stove, have caused the instantaneous conflagration that was so abrupt in its origin that Witness Jack E. Little was compelled as an act of self-preservation to crawl out of the building on his hands and knees? When the witness characterized this fire as traveling up the wall like a raising curtain; then does not this fire suggest one that had its derivation in an inflammable oil base liquid that had been freshly applied to the floor and walls? If this be the fact, then how did combustible substance become ignited in the absence of communication of the fire within the stove to the flash fire on the floor and walls? Then, if so, would Gailbreath be chargeable with the negligence of Appellants in applying or throwing an explosive substance in the vicinity of stove, which subsequently ignited from an unknown source? The negligent and perilous act of Appellees' insured in their imprudent application of the Standard Oil

Floor Hardener was the proximate cause of the flash fire that no man could extinguish.

F. Who furnished and installed the damper?

A perusal of the entire record will offer no clue to a solution of the supra interrogatory. It is common knowledge that a wood, oil or coal burning stove must have a damper. In the instance of any of the aforesaid stoves, the damper must be properly adjusted or a "HARMLESS PUFF" will result as the firebox breathes for oxygen.

In the case at bar, Appellant Gailbreath was the only witness who testified as to the damper.

> Q. Does that damper affect the amount of heat in the stove?
>
> A. Oh, yes. Oh, yes, it affects the distribution of the heat.
>
> Q. Did you deliver or sell to the lumber company that day any of those pipe connections or any of those dampers?
>
> A. No, sir. (T. Page 144.)
>
> Q. I see; and if the damper were not on the pipe, were not properly installed, would the pipe above the stove become hot?
>
> A. Yes, despending on the strength of the flue. It would become extremely hot if the flue was very strong. It would go up maybe three or four joints of extreme heat. (T. Pages 144-145.)

As a direct consequence, it would follow that the proper installation of the chimney, stovepipe and flue is just as necessary to the proper functioning of a "Customaire Oilburner" as the stove itself.

THE EVIDENCE DOES NOT ESTABLISH BY INFERENCE OR INNUENDO THAT THE FIRE WITHIN THE STOVE CAUSED THE FIRE OUTSIDE THE STOVE.

Appellees have rested their entire cause upon the "*res ipsa loquitur* doctrine" by reason of the fact that a fire had been burning within an oil stove and an employee of Gailbreath took a rag and wiped something from the floor—the origin of which has never been revealed—then a puff occurred, followed shortly thereafter by a flash, explosive, instantaneous fire that went up the walls like a curtain and forced the witness Charles W. Little to leave the room on his hands and knees.

The operational function of the stove was completely normal unless the "puff" would be considered unorthodox. This function was described as a puff and was apparently unaccompanied by any transmission of flame from the interior firebox to the exterior outside of the stove. Such a function on a damper controlled stove has occurred down through the ages in the instance of (1) The old woodburning stove in the farmhouse kitchen, (2) The old "pot bellied" coalburning stove in the country store, and (3) The more modern oil burning stove now used in home and office, all without any harmful results arising therefrom. By what factual phenomena did the fire within the stove cause the ignition of the floors and walls outside of the stove?

If the doctrine of "*res ipsa loquitur*" cannot be applied to the instant case, then have Appellees established that a specific act of negligence occurred on

the part of Appellant, or that such act was the proximate cause of the fire other than by conjecture, surmise, speculation, guess or the processes of a prejudiced imagination?

At the risk of being repetitious, we should again not be unmindful of the prevailing weight of authority to the effect that "The destruction of property by fire either upon the premises where it starts or is kindled on other property to which it is communicated, does not raise a presumption of negligence in either the kindling or management of the fire."

(See Seven Authorities Cited Page 13, Appellant's Opening Brief.)

The Roman-Anglo-American-California interpretation of the rule of *"res ipsa loquitur"*, which had its origin in the year one, has never been extended to property destroyed by fires either upon the premises where the fire originated, or on other property to which it is communicated.

California is in harmonious accord with the supra, prevailing rule, and has never extended the doctrine to a "fire". In California, civil liability for wrongful destruction of property by fire has always been predicated upon the law of negligence and the rule of ordinary care, requiring the plaintiff to prove (1) The negligent act, (2) The proximate cause, by the preponderance of the evidence and without the aid of the doctrine of *"res ipsa loquitur"*, for the reason that it is generally not unlawful to set a fire.

12 *Cal. Jur.* 524.

If the general law of negligence was applied to the instance of several automobiles being driven on a public highway which adjoined a ripe barley field during which period one of the automobiles backfired and shortly thereafter the field ignited and burned, then in the absence of additional facts, or the absence of sparks or some other causal connection, could this Court hold the owner of the backfiring automobile responsible upon the theory that negligence and proximate cause had been established? If the answer is in the negative, then are not the facts in the case at bar and the supra, automobile illustration of similar probative value, and shouldn't recovery be denied in either instance?

RES IPSA LOQUITUR IS NOT APPLICABLE.

Before the *res ipsa loquitur* doctrine can be applied Appellees must first establish, by a preponderance of the evidence, that the alleged dangerous instrumentality (the stove) was the proximate cause of the fire, and Second, That the instrumentality complained of, the stove and its accessories, were under the exclusive control of the Appellant.

If the Court finds that the fire was a sudden flash, explosive, instantaneous fire that suddenly enveloped the entire room, then it must be concluded that the combustible Standard Oil Floor Hardener was ignited and the Court may properly conclude that if the Standard Oil Floor Hardener had not been applied by Appellees or had dried prior to the day of

the fire, then the office building would have never been destroyed. Query, how was the Standard Oil Floor Hardener ignited? The answer to this interrogatory shall forever remain a mystery coupled with the fact. There is a complete absence of testimony, direct or indirect, primary, secondary, or circumstantial, as to how the fire could have been communicated from the inside of a steel enclosed stove to the floor and walls, except by conjecture.

> "It is not only necessary to show that the offending instrumentality was under the management of the defendant but it must be shown that it proximately caused the injury."
>
> 38 *Am. Jur.* 300, citing California cases.

If we are to indulge ourselves in the doctrine of probabilities, then we may as reasonably infer that the highly inflammable Standard Oil Floor Hardener, which was applied by the insured Herold Lumber Company, was ignited,

1. By a carelessly thrown match.

2. A burning cigarette.

3. The rays of the sun being focussed through a glass pane.

4. The voluntary act of one of Appellees' employees.

5. Spontaneous combustion.

6. A flue defectively installed by the Appellees.

7. A chimney defectively installed by the Appellees.

8. A damper defectively installed by Appellees.

9. Defective wiring.

10. An incandescent lamp.

In the case of *White v. Spreckels,* 10 Cal. App. 288, the defendant John Spreckels leased an office in his building and agreed to furnish steam heat from his boiler to the radiator in the office. The plaintiff was burned by escape of steam and hot water when the radiator exploded, whereupon the Court denied plaintiff application of the *res ipsa loquitur* doctrine and we do, infra, paraphrase the language of the Court.

"If we rely on the doctrine of probabilities we might as reasonably infer that the fire was caused by the spontaneous combustion of the highly combustible Standard Oil Floor Hardener or by reason of Appellees' faulty installation of the flue, chimney, or damper as to conclude that by some feat of sorcery a spark or flame escaped from the stove and ignited the Standard Oil Floor Hardener."

It is apparent that the installation commencing with the fuel tank and ending with the flue did comprise several units any one of which was essential to the successful operation of the stove. It is also manifest from the record that there was a division of responsibilities in the installation and management of the various units. The Appellees did install, manage and control the flue, chimney platform for the fuel tank and some person did install and control the damper. The Appellant did perform some acts of installation

on the stove proper. Certainly, the Appellant could not be made the absolute insurer for such defects that may have existed in the flue or chimney, he having never owned, possessed, installed or had any knowledge of the quality or installation of these units. Nor did he ever contract to assume such responsibility.

Again we are reminded of the California application of the doctrine as announced in the case of *Gerhart v. Southern Cal. Gas Co.,* 56 C.A. (2d) 245, infra,

> "It has often been held that where all of the instrumentalities which might have caused an accident, were not under the control of the defendant, the doctrine cannot apply".

Also see,

Godfrey v. Brown, 220 Cal. 57.

THE CASES CITED BY APPELLEES.

After reading and analyzing the cases cited by Appellees, it is apparent that they are relying to a large extent upon the facts and law as announced in the case of *Roselip v. Raisch,* 72 Cal. App. (2d) 125. This case is readily distinguishable from the facts in the instant case for the reason that in the *Roselip* case all of the elements of control of the dangerous instrumentality were established. The defendants had leased an asphalt plant from plaintiff and defendants did replace a wood heating unit with an oil burner, did make certain modifications in the plant and were in

full and sole control of the premises when the heating unit under the fuel oil tank did ignite, and the flames which spread from the furnace did destroy adjoining property of the plaintiff.

Also, in the *Roselip* case, it was proven that the defendant knew that the fuel oil plant generated inflammable gases which would pass off under the influence of heat, which in turn would be ignited by a flame, *and it was clearly established that the flames had their origin in the fire box, chimney and asphalt tank of defendant.*

The case of *Wright v. Southern Counties Gas Co.,* 102 Cal. App. 656, cited by Appellees, was one wherein escaping gas exploded in an apartment house.

The case of *Van Horn v. Pacific Refining & Roofing Co.,* 27 Cal. App. 105, cited by Appellees, was one wherein a cap blew off a steam pipe and steam and water escaped, to the injury of plaintiff. It is also interesting to note that in the *Van Horn* case the evidence did conclusively establish that none other than defendants' employees ever touched or tampered with the pipe and that the pipe, cap and escaping steam and water was the sole cause of plaintiff's injuries.

Our avenues of legal research fail to disclose that Appellees have cited one case involving the application of the *res ipsa loquitur* doctrine to the instance of a heating stove and burning of a building, while Appellant has cited three stove cases, see infra, all of which hold that a stove is not a dangerous instru-

mentality and that the doctrine of *res ipsa loquitur* cannot be applied.

Watenpaugh v. L. L. Coryell & Son, 283 N.W. 204 (Neb.);

McCabe v. Boston Consol. Gas Co., (Mass.) 50 N.E. 640;

Le Zotte v. Lindquist, 212 N.W. 503 (South Dakota).

CONCLUSION.

The Appellees have requested that this Court indulge itself in a nebulous application of the *res ipsa loquitur* doctrine to the facts of the instant case even though there is not one shred of evidence connecting the fire in the stove with the fire in the building. While it must be conceded that the law is a growing organism, nevertheless an interpretation of it in this instance must result in a definite and well established cleavage between the burden of proof in a negligence case and the doctrine of *res ipsa loquitur.* To do otherwise and extend the doctrine to the Appellees in the instant case would serve to bring chaos out of lucidity and order. If the doctrine is extended in this case we have grave doubt if any student of the law of negligence would be able to reconcile the doctrine of *res ipsa loquitur* and its application to a stove case.

If the doctrine is applied in this action and the judgment is affirmed, then the legal requirements of evidentiary proof in a negligence action have been for-

ever removed from posterity and the plaintiff can prove his case by simply establishing the following coincidence, a fire was burning in a stove when a building became ignited.

It is, therefore, respectfully submitted that the findings of fact made by the lower Court are without evidentiary support and that the judgment herein should be reversed.

Dated, Sacramento, California,
August 14, 1950.

Respectfully submitted,
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